Case Name:

R. v. Ladue

Between
Regina, Respondent, and
Frank Ralph Ladue, Appellant

[2011] B.C.J. No. 366

2011 BCCA 101

Docket: CA038126

British Columbia Court of Appeal
Vancouver, British Columbia

R.E. Levine, E.C. Chiasson and E.A. Bennett JJ.A.

Heard: October 18, 2010.
Judgment: March 8, 2011.

(109 paras.)

Criminal law -- Sentencing -- Criminal Code offences -- Other Criminal Code offences -- Breach of long-term supervision order -- Particular sanctions -- Imprisonment -- Sentencing considerations -- Rehabilitation -- Aboriginal offenders -- Previous record -- Lengthy -- Addicts -- Drugs -- Alcohol -- Appeal by accused from three-year sentence for breaching a condition of his long-term supervision order by consuming intoxicants allowed -- Sentence reduced to one year's imprisonment -- Accused, an Aboriginal offender, had a criminal record including 40 prior convictions -- Accused had a long-standing drug and alcohol problem -- Sentencing judge overemphasized principle of separating offender from society and gave insufficient weight to rehabilitation -- She also failed to give sufficient weight to accused's circumstances as an Aboriginal offender -- Sentence imposed was not proportionate to gravity of offence and accused's degree of responsibility.

Appeal by the accused from a three-year sentence for breaching a condition of his long-term supervision order by consuming intoxicants. The supervision order was imposed for conviction for breaking into a dwelling-house and committing a sexual assault by touching the complainant's

breasts over her clothing. This was the accused's fourth conviction for similar sexual offences, all involving the consumption of alcohol or drugs. His criminal record was comprised of 40 prior convictions. The accused, 48, was an Aboriginal. He suffered physical, sexual, emotional, and spiritual abuse as a child in a residential school. He had abused alcohol and drugs for most of his life and had made numerous attempts at overcoming his addictions. The accused argued that the sentencing judge erred when she considered reports from the Correctional Service of Canada which he disputed and by failing to give effect to the accused's Aboriginal heritage.

HELD: Appeal allowed. The sentence was reduced to one year's imprisonment. Since the accused relied on parts of the reports, it was reasonable for the sentencing judge to request the reports in order to consider the parts relied upon in the context of the full reports. If the accused wished to contest parts of the reports, he should have specifically identified those parts of the reports he was challenging when he consented to them being marked as exhibits on the sentencing hearing. No error was committed as a result of reliance on the reports. Although the sentencing judge was alive to the accused's history and circumstances, she overemphasized the principle of separating the offender from society and gave insufficient weight to the principle of rehabilitation. The sentencing judge also erred in failing to give sufficient weight to the accused's circumstances as an Aboriginal offender. The direction to exercise restraint with particular attention to Aboriginal offenders was still to be applied even in the circumstances of a long-term offender. The sentence imposed was not proportionate to the gravity of the offence and the accused's degree of responsibility. A sentence of one year would be enough time for the accused to achieve sobriety and for the correctional staff to find an appropriate half-way house for him which emphasized Aboriginal culture and healing. Sentence: One year's imprisonment.

Statutes, Regulations and Rules Cited:

Corrections and Conditional Release Act, S.B.C. 1992, c. 20, s. 100, s. 134.1(2)

Criminal Code, R.S.C. 1985, c. C-46, s. 718, s. 718.1, s. 718.2, s. 718.2(e), s. 723, s. 723(3), s. 724, s. 753.1

Appeal From:

On appeal from: Provincial Court of British Columbia, April 21, 2010, (*R. v. Ladue*, Vancouver Docket 211140-1)

Counsel:

Counsel for the Appellant: H.M. Patey.

Counsel for the Respondent: M.T. Ainslie.

Reasons for judgment were delivered by E.A. Bennett J.A., concurred in by R.E. Levine J.A. Dissenting reasons were delivered by E.C. Chiasson J.A. (para. 84).

Reasons for Judgment

1 E.A. BENNETT J.A.:-- Frank Ladue is a long-term offender. He breached a condition of his long-term supervision order by consuming intoxicants and was sentenced to three years additional imprisonment. He appeals this sentence on the basis that the sentencing judge considered disputed evidence, failed to give effect to his circumstances as an Aboriginal offender, and imposed a sentence that was demonstrably unfit.

Overview of the Facts of the Predicate Offence

2 On December 3, 2003, Mr. Ladue was sentenced to three years in prison for the offence of breaking into a dwelling house and committing sexual assault. The trial judge concluded that a fit sentence would be in the range of five to six years, but reduced the sentence to three years as a result of crediting Mr. Ladue for the time he spent in custody awaiting trial, which was some 14 months.

3 The predicate offence involved Mr. Ladue entering a house in his home town of Ross River, Yukon Territory. Some of the occupants of the house had consumed a large quantity of intoxicants, and the 22-year-old complainant was in a comatose condition, lying in the living room. She awoke to find Mr. Ladue touching her breasts over her clothing. He then attempted to unbutton her pants. She was incapable of resisting, but others in the house chased him away.

4 This was Mr. Ladue's fourth conviction for similar sexual offences, all involving the consumption of alcohol or drugs. His criminal record is comprised of some 40 prior convictions. As a result, the Crown sought a long-term offender designation. This designation was conceded by Mr. Ladue. The trial judge imposed a seven-year supervision order. A condition was imposed by the National Parole Board that Mr. Ladue abstain from intoxicants while under supervision.

Circumstances of Mr. Ladue

5 Mr. Ladue, now age 48 years, is a member of the Ross River Dena Council in the Yukon, which is a small community of about 500 people. Ross River is approximately 400 km north-east of Whitehorse by road. Ross River Dena Council is a member of the Kaska Nation. The pre-sentence report reviews the history of the Ross River community as part of a *Gladue* report (*R. v. Gladue*, [1999] 1 S.C.R. 688) prepared on behalf of Mr. Ladue. Mr. Ladue's brother, Gary Ladue, is a band councillor with the Ross River Dena Council. He was interviewed, along with Deputy Chief Jenny Caesar, in order to gain insight into Mr. Ladue and his Aboriginal heritage.

6 Deputy Chief Caesar reported that the community members suffered abuse early on when the United States Army built a pipeline through their area in the 1940s. A number of members of the community were raped and assaulted by Army personnel. The people of the community were "further traumatized by having their children taken away to residential schools in the following decades and the ripple effects of this cultural genocide [continue] on to this day". The community still suffers from a number of problems including substance abuse by its members, violence, and abuse within the community.

7 Mr. Ladue was sent to live with his grandparents at an early age because his parents suffered from significant substance abuse problems. Both of his parents died when he was very young and records indicate that his mother may have been murdered. He has good memories of living with his grandparents as they trapped and lived off their traditional food and spoke their traditional language. At the age of five years, he was removed from his community and sent to residential school where he suffered from physical, sexual, emotional, and spiritual abuse. He was not permitted to speak his language and was beaten if he did. He tells of serious sexual abuse inflicted on him by two employees at the school. He eventually received $16,000 compensation in 2007 but gave the money away to his family. The probation officer who prepared the pre-sentence report stated that Mr. Ladue's experience at residential school "has had a profound, long-lasting impact on Mr. Ladue's life and he continues to struggle with it to the present day."

8 He was able to return to his grandparents when he was nine years old, but by then significant damage had been done to him. He could no longer speak the language of his grandparents and he began drinking alcohol at this young age. He began to get into trouble and was sent to foster families and eventually juvenile detention.

9 Ms. Caesar reported that there are no restorative justice practices in Ross River, although they have "sweats" two or three times a year. There are community wellness workers, as well as a family support worker, and a mental health worker once a month. Ms. Caesar indicated that while some might be opposed to Mr. Ladue returning to the community eventually, she said "we have to try to support one another". Gary Ladue stated that he would prefer to see his brother address his alcohol and drug problems before returning to the community, and indicated that Mr. Ladue's family, including Gary Ladue, is now, by and large, sober. Mr. Ladue would like to return to his community. He is an accomplished carver, has relearned the traditional language and can harvest food and survive in the traditional way.

10 He has abused alcohol for most of his life. However, he had one six-year period of sobriety in the 1990s which also coincides with a similar period of no criminal convictions on his record. He began using illicit drugs when he was in the federal penitentiary, and has added heroin, cocaine and morphine to the list of substances he abuses.

11 Mr. Ladue has completed treatment programs for both substance abuse and sexual offending. While he has not offended sexually since 2002, he has had great difficulty staying away from drugs

and alcohol. The pre-sentence report indicates that "alcohol and/or drug use is a direct precursor to his criminal activity". He was identified as a "serial sexual offender" in the pre-sentence report. He obviously met the criteria for a long-term offender, which means that there is a substantial risk he will reoffend.

Circumstances Surrounding the Offence of Breaching the Long-Term Supervision Order

12 Mr. Ladue was released on his long-term supervision order on December 1, 2006. On June 5, 2007, he was convicted of two counts of breaching the order and sentenced to six months on each count to be served concurrently, with credit for four-and-a-half months of pre-sentence custody. On June 19, 2008, he was convicted of a third offence of breaching his long-term supervision order and sentenced to one day in custody, with credit for one year of pre-sentence custody. All three breach offences were due to violations of the condition that he abstain from the consumption of intoxicants.

13 Mr. Ladue's supervision order was suspended a number of times in 2008 and 2009. He was released from custody on August 12, 2009. He expected to be sent to Linkage House in Kamloops, B.C., a residential halfway house operated by the John Howard Society. He anticipated receiving considerable support in that environment, as there was an Aboriginal elder who worked with the occupants of Linkage House.

14 However, and most unfortunately, Mr. Ladue was not sent to Linkage House. On the date of his release, an outstanding warrant for providing DNA was discovered (although it had been ordered months earlier) and he was not released until the warrant was executed. As a result of this delay, his placement at Linkage House was no longer available. Instead, he was placed in Belkin House, in downtown Vancouver. Mr. Ladue says he pleaded with his parole officer not to be sent to Belkin House due to the easy access to drugs, both in the residence and in the neighbourhood. Mr. Ladue was immediately exposed to the very drugs he was forbidden to ingest. He tested positively on more than one occasion for morphine and cocaine. He admitted the use of the drugs and offered explanations for his conduct, but was somewhat deceitful with the staff. The staff determined that he should be suspended and he was charged with the offence of breaching his long-term supervision order.

15 He pleaded guilty to this offence on February 10, 2010, and was sentenced on April 21, 2010, to three years' imprisonment.

Issues on Appeal

16 Mr. Ladue submits that the learned sentencing judge erred in the following ways:

i) she considered evidence during the sentencing hearing which the appellant disputed;
ii) she failed to give effect to the fact that Mr. Ladue is an Aboriginal offender and to s. 718.2(e) of the *Criminal Code*; and

iii) the sentence she imposed was demonstrably unfit in the circumstances.

The Principles of Sentencing

17 It is useful to set out the statutory principles of sentencing in the *Criminal Code* relevant to this appeal:

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (*a*) to denounce unlawful conduct;
>
> (*b*) to deter the offender and other persons from committing offences;
> (*c*) to separate offenders from society, where necessary;
> (*d*) to assist in rehabilitating offenders;
> (*e*) to provide reparations for harm done to victims or to the community; and
> (*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
>
> * * *
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (*a*) ...
>
> (*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
(*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
(*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The Structure of the Long-Term Supervision Orders

18 Before I commence my analysis of the alleged errors, I wish to set out the relevant legislative structure of the long-term offender regime as designed by Parliament and interpreted by the courts.

19 The long-term offender legislation was proclaimed in force on August 1, 1997. The legislation was the result of recommendations made by the Federal/Provincial/ Territorial Task Force on High-Risk Violent Offenders (1995). The legislative scheme permits judges to sentence offenders to two years or more in custody to be followed by a supervision order of a maximum of ten years:

> 753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
>
> (*a*) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
> (*b*) there is a substantial risk that the offender will reoffend; and
> (*c*) there is a reasonable possibility of eventual control of the risk in the community.
>
> * * *
>
> (3) If the court finds an offender to be a long-term offender, it shall
>
> (*a*) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and
> (*b*) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

20 The provisions of the *Corrections and Conditional Release Act*, S.B.C. 1992, c. 20 ("*CCRA*")

and *Regulations*, SOR/92-620, apply to the supervision orders. Section 134.1(2) provides that the National Parole Board can impose conditions as terms of the supervision order that it "considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender." The Board is also required to impose mandatory conditions which are found in s. 161 of the *Regulations*. The condition to abstain from intoxicants imposed on Mr. Ladue is a discretionary term imposed under s. 134.1(2) of the *CCRA*.

21 Section 100 of the *CCRA* applies to those subject to a long-term supervision order (per s. 99.1), and reads as follows:

> 100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

22 There is no minimum sentence for the breach of a long-term supervision order and the maximum penalty is ten years imprisonment:

> 753.3 (1) An offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years.

Discussion of Issues on Appeal

i) Consideration of disputed reports

23 Mr. Ladue submits that the sentencing judge erred when she considered reports from the Correctional Service of Canada ("CSC") which he disputed.

24 Counsel for Mr. Ladue made submissions to the sentencing judge regarding the failure of CSC to send Mr. Ladue to Linkage House in Kamloops and its decision to send him to Belkin House in Vancouver. In support of this submission, he produced some reports from CSC, and, in essence, cherry-picked the bits of the reports he wished to rely upon. He said, "I'm going right out of the CSC report - [Mr. Ladue] was set up to fail". At this point, the sentencing judge suggested that defence counsel file the report. Defence counsel said he would be happy to file it. Copies of reports were obtained and a progress assessment dated August 31, 2009, and an assessment for decision (whether to proceed with a criminal charge) dated September 22, 2009, were filed as exhibits.

25 After the reports were filed, counsel for the defence took the sentencing judge to the parts which were relevant to his submission. He made no objection to the remainder of the report at this time. The Crown, in reply, referred to large passages from the reports. Defence counsel then objected to some of the content of the report being considered. The following exchange occurred between counsel and the judge:

MR. PATEY: ... I don't want to engage in sort of a trial of every last allegation that is contained in these reports. Mr. Ladue has pleaded guilty to the offence, he did use drugs and he did breach, but whether CSC's believed version of events is entirely the accurate one is -- well, is the subject of a good deal of controversy here. So I don't know that it's going to help for my friend to -- to read in every -- every portion of these reports that sort of paints Mr. Ladue in the worst possible light. Some of it's accurate and some of it isn't. He breached, he did use, it was more than once, he has admitted that, and I've indicated repeatedly that he does take responsibility for it. And in my submission, if -- if we start -- if the level of factual allegations that are going to be put before this court are going to be that each and every word stated by CSC in its reports is the gospel, that's not going to be admitted and we're -- and we're going to get into difficulty.

THE COURT: All right. Well, let me just say, Mr. Patey, your friend didn't refer to these reports in his original submissions, you did --

MR. PATEY: Mm-hmm.

THE COURT: -- and I asked to see copies of the reports --

MR. PATEY: Yes.

THE COURT: -- because you clearly were referring to unique, small bits and pieces --

MR. PATEY: Yes.

THE COURT: -- out of the reports. I'm going to read the reports and I'll make my own assessment --

MR. PATEY: Thank you.

THE COURT: -- on the basis of reading the entire reports. And, Mr. Krupa, if that means you don't have to read the reports to me, then fine.

26 Another report, dated September 17, 2009, which was a re-assessment of Mr. Ladue's suitability for Linkage House, was filed on April 21, 2010, the morning the sentence was imposed. The content of this report is not in issue.

27 In her reasons for sentencing, the judge referred to the content of these reports at some length. Much of what she referred to was also found in the pre-sentence report and in the reasons for judgment of Judge Faulkner who had imposed the original long-term supervision order.

28 The admission of evidence on a sentencing hearing is governed by ss. 723 and 724 of the *Criminal Code* as set out below:

> Submissions on facts
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> 723. (1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.
>
> Submission of evidence
>
> (2) The court shall hear any relevant evidence presented by the prosecutor or the offender.
>
> Production of evidence
>
> (3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.
>
> Compel appearance
>
> (4) Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.
>
> Hearsay evidence

(5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person

(*a*) has personal knowledge of the matter;

(*b*) is reasonably available; and

(*c*) is a compellable witness.

Information accepted

724. (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

* * *

Disputed Facts

(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

(*a*) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
(*b*) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
(*c*) either party may cross-examine any witness called by the other party;
(*d*) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
(*e*) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

29 Here, the sentencing judge required the production of the CSC reports, as she was entitled to do pursuant to s. 723(3). Given that defence counsel was reading from them in a somewhat haphazard manner, this was a more than reasonable request.

30 Mr. Ladue submits that the judge should not have considered the parts of the reports which he did not rely upon as they were disputed, and the Crown bore the onus of proving the contents.

31 There is no question that the Crown has the obligation to prove any aggravating fact beyond a reasonable doubt: see s. 724(3)(e) and *R. v. Gardiner*, [1982] 2 S.C.R. 368. Any party wishing to rely on a relevant fact, including a fact in a pre-sentence report, has the burden of proving the fact: see s. 724(3)(b). However, these provisions do not come into play until the fact is disputed. What constitutes a dispute may differ depending on the circumstances, but any dispute over the facts presented on a sentencing hearing must be clear and unequivocal: see *R. v. Ford*, 2010 BCCA 105, 254 C.C.C. (3d) 442; and *R. v. Hodwitz*, [1985] B.C.J. No. 1676 (C.A.).

32 Mr. Ladue was relying on parts of the CSC reports. It was reasonable for the sentencing judge to request the reports in order to consider the parts relied upon in the context of the reports. If Mr. Ladue wished to contest parts of the reports, he should have specifically identified those parts of the reports he was challenging when he consented to them being marked as exhibits on the sentencing hearing. Mr. Ladue took the unusual position that he was not admitting parts of the reports after he had tendered them as evidence on the sentencing hearing.

33 In my opinion, there was no clear factual dispute that had to be resolved by the sentencing judge. In the circumstances which arose here, no error was committed as a result of reliance on the reports.

ii) Failure to give effect to the circumstances of Mr. Ladue's Aboriginal heritage

34 Section 718.2 (e) of the *Criminal Code* states:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles: ...
>
> (*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

35 This provision was part of Bill C-41 which was proclaimed in force on September 3, 1996. Parliament took the step of codifying principles of sentencing, and while many of the principles were developed over decades (if not centuries) of jurisprudence and philosophical debate, some

principles were new. The principle of restraint when imposing a sentence, found throughout the Bill, is not in itself a new principle. What was new was the principle's specific articulation in s. 718.2(e) which included a statutory direction for sentencing judges to pay particular attention to the circumstances of Aboriginal offenders.

36 The rationale for the specific reference to the circumstances of Aboriginal offenders was made clear by the then Minister of Justice, Allan Rock, when he appeared before the House of Commons Standing Committee on Justice and Legal Affairs and said:

> [T]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada. I think it was the Manitoba justice inquiry that found that although aboriginal persons make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates. Nationally aboriginal persons represent about 2% of Canada's population, but they represent 10.6% of persons in prison. Obviously there's a problem here.[1]

37 The provisions were introduced in an attempt to remedy the situation of the high overrepresentation of Aboriginal people in prison.

38 In *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court of Canada comprehensively examined this provision. Ms. Gladue, an Aboriginal woman, aged 19 years, was convicted of manslaughter in the death of her common-law husband. She received a sentence of three years' imprisonment.

39 The Court gave important directions to judges with respect to the application of this provision. The Court held that s. 718.2(e) changes the method of analysis to be used in determining a fit sentence for an Aboriginal offender. At paras. 33-34, the Court said this:

> In our view, s. 718.2(*e*) is *more* than simply a re-affirmation of existing sentencing principles. The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. It should be said that the words of s. 718.2(*e*) do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. For example, as we will discuss below, it will generally be the case as a practical matter that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders. What s. 718.2(*e*) does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender. In our view, the scheme of Part XXIII of the *Criminal Code*, the context underlying the enactment of s. 718.2(*e*),

> and the legislative history of the provision all support an interpretation of s. 718.2(*e*) as having this important remedial purpose.
>
> In his submissions before this Court, counsel for the appellant expressed the fear that s. 718.2(e) might come to be interpreted and applied in a manner which would have no real effect upon the day-to-day practice of sentencing aboriginal offenders in Canada. In light of the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system, we do not consider this fear to be unreasonable. In our view, s. 718.2(e) creates a judicial duty to give its remedial purpose real force.

[Underlining added.]

40 The Court reiterated its position on the newly created duty of the judiciary at paras. 64-65:

> ... The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.
>
> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

[Underlining added.]

41 The Court then set out "A Framework of Analysis" for sentencing judges. At para. 66, the Court discussed the "wide range of unique circumstances" affecting Aboriginal peoples. In particular, the Court looked at two issues which are unique to Aboriginal offenders:

> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

42 The Court identified what it saw as systemic and background factors that caused many Aboriginal people to become involved in criminal activity. These include dislocation and economic development resulting in low incomes, high unemployment, lack of opportunities, lack of education, substance abuse and community fragmentation. Dislocation refers to the marginalization of Aboriginal peoples onto reserves from their traditional lands and impingement onto their traditional lands as a result of economic development. In essence, the Court acknowledged the historical process of colonization as the root cause of many of the enormous difficulties facing Aboriginal peoples. The Court directed sentencing judges to take these factors into account, and consider whether other forms of sentences, such as restorative sentencing, would be more appropriate than prison.

43 At para. 69, the Court said this:

> In this case, of course, we are dealing with factors that must be considered by a judge sentencing an aboriginal offender. While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

44 The Court also noted that traditional sentencing principles such as deterrence, denunciation and separation of the offender are often less relevant to Aboriginal communities, which traditionally place more weight on reparation and restorative sentences.

45 The direction from the Supreme Court could not be clearer. The unique circumstances of an Aboriginal offender must be taken into consideration when passing sentence. The extent to which these circumstances will affect a sentence will depend on each case. The Court made it clear that there is no automatic Aboriginal discount of the sentence. Furthermore, the more serious the crime, the more reduced a role these circumstances will play in crafting a fit sentence: see *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207.

46 One might reasonably expect the overrepresentation problem to have abated somewhat in the fifteen years following the introduction of s. 718.2(e). However, current statistics, which I refer to below, show that instead of declining, the Aboriginal population in prisons has been increasing since the proclamation of Bill C-41 and the decision in *Gladue*.

47 There were a number of reports and commissions referenced in *Gladue* which provide the context for the proclamation of s. 718.2(e). I will briefly review some of this material in an attempt to emphasize the importance of the direction of restraint in sentencing.

48 The causes of overrepresentation of Aboriginal people in Canada's prisons are complex. It is clear that requiring judges to pay special attention to the unique circumstances of Aboriginal offenders offers very limited remedial assistance to the problem, which transcends the criminal justice system. It is one of those initiatives which provides, to quote the report of the Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*[2], "short-term palliative relief". Judges imposing sentences cannot, and surely are not, expected to touch the root causes of overrepresentation of Aboriginal people in prison, some of which are created by socioeconomic marginality and deprivation, along with systemic discrimination.

49 In *Bridging the Cultural Divide*, the Royal Commission on Aboriginal Peoples spends a considerable amount of time reviewing the serious problem of overrepresentation of Aboriginal people in prison, which has been documented and commented on since as early as 1967. In 1988, the Canadian Bar Association retained Professor Michael Jackson to prepare a report which he called "Locking Up Natives in Canada"[3]. Professor Jackson made the bleak observation, also referred to by the Court in *Gladue* at para. 60, that in Saskatchewan an Indian boy turning 16 in 1976 had a 70% chance of at least one stay in prison by the time he turned 25 years old. He said, at 216:

> Put another way, this means that in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represent for the rest of us. Placed in an historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents.

50 In 1988, the Aboriginal population in Canada was 2%, while Aboriginal people represented 10% of the federal penitentiary population, including about 13% of women in federal institutions. Between 1998 and 2008, the population of federal Aboriginal offenders increased by 19.7% and the

number of federally incarcerated Aboriginal female offenders increased by 131%. By 2009, the Aboriginal population comprised 4% of the general population, while the population of federal Aboriginal offenders stood at 19.6%, and 33.1% if just considering female Aboriginal offenders.[4] In British Columbia, the Aboriginal population in prison as of 2006/2007 was 22% while the population in the community was 5%.[5]

51 While all of the principles and purposes of sentencing must be weighed and considered (see *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163 at para. 17), when sentencing an Aboriginal offender, consideration must be given to the principles of rehabilitation, restorative justice and promoting a sense of responsibility in the community. These are the principles that many commissions and reports acknowledge are more culturally ingrained for the Aboriginal person than deterrence, denunciation and separation. In *Gladue*, the Court said this at paras. 77 and 78:

> ... As explained herein, the circumstances of aboriginal offenders are markedly different from those of other offenders, being characterized by unique systemic and background factors. Further, an aboriginal offender's community will frequently understand the nature of a just sanction in a manner significantly different from that of many non-aboriginal communities. In appropriate cases, some of the traditional sentencing objectives will be correspondingly less relevant in determining a sentence that is reasonable in the circumstances, and the goals of restorative justice will quite properly be given greater weight. Through its reform of the purpose of sentencing in s. 718, and through its specific directive to judges who sentence aboriginal offenders, Parliament has, more than ever before, empowered sentencing judges to craft sentences in a manner which is meaningful to aboriginal peoples.
>
> In describing the effect of s. 718.2(*e*) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.

52 Judges can only play a limited role in ameliorating the overrepresentation of Aboriginal people in Canadian prisons, as the root causes of this phenomenon stretch far beyond the reach of the courts. However, despite these limitations, we have been directed by both Parliament and the Supreme Court to consider the unique circumstances of Aboriginal people and to implement community-based sentences whenever appropriate.

53 I would also add that the choice is not simply custody or not custody. Sometimes a reduction in the length of a sentence may be appropriate to accommodate subsequent probation orders in order to achieve a restorative sentence. If a prison sentence is required because of the nature of the offence and circumstances of the offender, it may be appropriate to focus on sanctions which incorporate less time in prison, rather than continuing to increase the sentences imposed (*Gladue* at para. 79).

54 Given the increasing Aboriginal prison population in both British Columbia and Canada, in my respectful view, the principles stated in *Gladue* need to be reiterated.

55 In *Gladue*, at para. 80, the court suggested some questions a judge can answer in order to achieve a fit sentence:

> As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

[Emphasis in original.]

56 In *R. v. Mack*, 2008 BCCA 520, this Court held that a failure to refer to s. 718.2(e) is not necessarily a reversible error. The Court said, at para. 12:

> Justice Cory and Justice Iacobucci also commented at paragraph 85 that section 718.2(e) does not impose a duty on a sentencing judge to provide reasons, although they indicated that it would be easier for a reviewing court to determine whether attention was paid to the circumstances of the offender as an aboriginal person if reasons are given. Hence, the failure of the sentencing judge to specifically mention section 718.2(e) does not, in itself, constitute error. The sentencing judge was aware that Mr. Mack was an aboriginal person, and she referred at paragraph 5 of her reasons to the principles of sentencing, which she is presumed to know. There was nothing in the submissions regarding Mr. Mack's circumstances as an aboriginal offender that the judge was required to

specifically address in her reasons for sentencing.

57 In my respectful view, while the failure to reference s. 718.2(e) is not automatically an error, judges cannot relinquish their duty and fail to follow the analysis clearly set out in *Gladue*. This Court recently observed in *R. v. Napesis*, 2010 BCCA 499, at para. 17:

> In my view, it behoves every sentencing judge, even those faced with what is effectively a joint submission on sentence in a busy court, not only to take seriously the duty to aboriginal offenders summarized at para. 93 of *Gladue*, but also to demonstrate on the record and in reasons that he or she has done so. As almost everyone involved in the justice system will attest, the very best result of a criminal prosecution is a rehabilitated offender. That result can be achieved only if counsel and the sentencing judge fulfill the expectations implicit in their acceptance of roles in that system, particularly during the sentencing process.

58 In *Gladue*, the Court did not insist on reasons, but highly recommended that reasons be provided. In *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, the Court clarified that reasons sufficient to permit appellate review are necessary. In *R. v. Wells*, *supra*, the Court reiterated the duty of the trial judge in every case to take judicial notice of systemic or background factors that have contributed to the difficulties faced by Aboriginal peoples. Additionally, the trial judge is required to inquire into the relevant circumstances when an Aboriginal person is to be sentenced (paras. 53-54). However, the decision also modifies the requirement established in *Gladue*. The Court said this at para. 55:

> Having said that, it was never the Court's intention, in setting out the appropriate methodology for this assessment, to transform the role of the sentencing judge into that of a board of inquiry. It must be remembered that in the reasons in *Gladue*, this affirmative obligation to make inquiries beyond the information contained in the pre-sentence report was limited to "appropriate circumstances", and where such inquiries were "practicable" (para. 84). The application of s. 718.2(*e*) requires a practical inquiry, not an impractical one. As with any other factual finding made by a court of first instance, the sentencing judge's assessment of whether further inquiries are either appropriate or practicable is accorded deference at the appellate level.

59 In my view, what is critical, fifteen years after the proclamation of Bill C-41, is the fact that the overrepresentation of Aboriginal people in prison is increasing. The decision in *Napesis* emphasizes the importance of sentencing judges taking the time to apply the principles as they relate to Aboriginal offenders.

60 The Ontario Court of Appeal recently addressed the importance of the application of restraint and restorative justice principles found in s. 718.2(e). In *R. v. Jacko*, 2010 ONCA 453, 256 C.C.C. (3d) 113, the trial judge acknowledged and considered the circumstances of the Aboriginal

offenders; however, in the Court's view, he erred by failing to give sufficient weight to the appellants' Aboriginal heritage. Of significance, Mr. Justice Watt, for the Court, said at para. 87:

> In cases such as these, we must do more than simply acknowledge restorative justice sentencing objectives and note approvingly the rehabilitative efforts of those convicted. They must have some tangible impact on the length, nature and venue of the sentence imposed.

61 I turn now to the specifics of Mr. Ladue's sentence. The learned sentencing judge was alive to the history of Mr. Ladue. She outlined some of the circumstances of his background set out in the pre-sentence report. She was referring to his circumstances when she said that "through no fault of his own, Mr. Ladue is a damaged person" (para. 31). However, like the judge in *Jacko*, in my respectful view, the sentencing judge did not give sufficient weight to the circumstances of Mr. Ladue as an Aboriginal offender.

62 The sentencing judge overemphasized the principle of separating the offender and insufficient weight to the principle of rehabilitation. At paras. 26 and 27 of her reasons for judgment, she stated:

> Apart from situations where a minimum sentence is prescribed by law, an offender should only be incarcerated when no other available sentence will suffice to address all of the principles or objectives of sentencing, and any sentence of incarceration should be the minimum that is required to address all of the principles or objectives of sentencing. The sentencing judge must consider the circumstances of the offence and the circumstances of the offender, and attempt to craft a sentence which addresses all of those principles or objectives of sentencing for the unique offence committed by the unique offender in the case under consideration. The objectives of sentence generally relevant, and relevant here, are rehabilitation, general and specific deterrence, denunciation and isolation of the offender.
>
> On the basis of the circumstances set out in these reasons, I am satisfied that the purpose of sentencing that I must emphasize today is isolation of the offender. I have concluded that only by isolating Mr. Ladue from the community can I protect the community from him.

63 The trial judge was aware of Mr. Ladue's many failed attempts to live in the community without breaching his long-term supervision order. However, when sentencing Aboriginal offenders, effect must be given to the circumstances of their Aboriginal heritage in cases such as this. Mr. Ladue desires to succeed, as exhibited by his request not to be sent to Belkin House. However, he is addicted to drugs and alcohol, which can directly be related to how he was treated as an Aboriginal person. He has not reoffended in a manner which threatens the safety of the public. He will ultimately be released into the community without supervision. Unless he can manage his

alcohol and drug addiction in the community he will very likely be a threat to the public. Repeated efforts at abstinence are not unusual for those dealing with addiction. Indeed, Mr. Ladue demonstrated that he is capable of abstinence as shown by his conduct a number of years ago.

64 While the trial judge acknowledged his Aboriginal heritage, she did not give it any tangible consideration when sentencing Mr. Ladue. If effect is to be given to Parliament's direction in s. 718.2(e), then there must be more than a reference to the provision. It must be given substantive weight, which will often impact the length and type of sentence imposed.

65 In my respectful view, the trial judge erred in failing to give weight to Mr. Ladue's Aboriginal heritage and, as a result, she focused on "isolation of the offender" without giving sufficient weight to his circumstances as an Aboriginal offender.

iii) Fitness of Sentence

66 The standard of review in a sentence appeal is set out in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para. 90:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code*. ... [Emphasis in original.]

67 In my respectful view, the sentencing judge made two errors which led her to impose a demonstrably unfit sentence. The first is the failure to give sufficient weight to his circumstances as an Aboriginal offender. The second is her overemphasis on isolation or separation from the community and failing to give sufficient emphasis to the principles of rehabilitation and proportionality.

68 She treated Mr. Ladue as someone from whom the community required protection, reasoning that because his earlier violent offences (last committed in 2002) stemmed from his substance abuse, his use of intoxicants while in Belkin House put the public at risk. However, Mr. Ladue was being sentenced for violating a term of his long-term offender supervision order while living in a community correctional facility. It was an offence against the administration of justice. There was nothing to indicate that he had come close to engaging in the violent sexual behaviour which attracted the long-term supervision order in the first place, either on this occasion or in any of his earlier breaches of the condition.

69 I am alive to the decisions that hold that a breach of a long-term supervision order is not similar to the breach of a term of a probation order. It is much more serious as borne out by the fact that the offence is strictly indictable and has a maximum sentence of ten years. As this Court said in

R. v. Deacon, 2004 BCCA 78, 182 C.C.C. (3d) 257 at para. 51:

> However, the gravity of an offence under s. 753.3 must be measured with reference not only to the conduct that gave rise to the offence, but also with regard to what it portends in light of the offender's entire history of criminal conduct. To consider only the moral turpitude associated with the sort of innocuous conduct that s. 753.3 renders criminal (e.g. engaging a child in conversation) is not a useful way to gauge the appropriate sentence for breach of a long-term supervision order. In this case, for example, the appellant's brief interaction with the ten-year-old boy at Harbour Light was, in context, highly charged: the appellant had refused treatment that might reduce his risk of paedophilic behaviour; he deliberately put himself in a position where the risk of recidivism was extreme; and he set out on a course of conduct that, uninterrupted, would in all likelihood have led to a paedophilic sexual offence, given his history of criminal conduct. Thus, the gravity of the offence and the degree of responsibility of the offender were high.

70 There is a distinction between being designated as a long-term offender and a dangerous offender. The purpose of the long-term supervision order is not just to protect the public but also to assist offenders with their rehabilitation. As Mr. Justice LeBel said in *R. v. L. M.*, *supra*, at para. 42:

> Although they both contribute to assuring public safety, the dangerous offender and long-term offender designations have different objectives. Unlike a *dangerous* offender (s. 753 *Cr. C.*), who will continue to be deprived of liberty, since such offenders are kept in prison to separate them from society (s. 718.1), a *long-term* offender serves a sentence of imprisonment of two years or more and is then subject to an order of supervision in the community for a period not exceeding 10 years for <u>the purpose of assisting in his or her rehabilitation</u> (s. 753.1(3) *Cr. C.*). This measure, which is less restrictive than the indeterminate period of incarceration that applies to dangerous offenders, protects society and is at the same time consistent with [translation] "the principles of proportionality and moderation in the recourse to sentences involving a deprivation of liberty" (*Dadour* [F. Dadour, *De la détermination de la peine; principes et applications* (Markham, Ont.: LexisNexis, 2007)], at p. 228).

[Italics in original; underlining added.]

71 Counsel referred us to two decisions which in my respectful view require comment. The first is *R. v. H.P.W.*, 2003 ABCA 131, 175 C.C.C. (3d) 56, which dealt with a breach of a long-term supervision order. In that case, the Court said that rehabilitation plays a small role in long-term offender orders. Such orders are "designed to ensure management of high risk or moderate to high risk offenders in the community. Protection of society has to be the paramount consideration ..."

(para. 35). While I do not disagree that protection of society is a very important consideration, I respectfully disagree that rehabilitation must play a small role with those designated as long-term offenders. In my opinion, the role of rehabilitation will depend on the circumstances of the offender and is not dependent on his or her designation. In my respectful view, the decision in *R. v. L.M.* clarifies the importance of rehabilitation as part of the long-term supervision order.

72 Additionally, the Court in *H.P.W.* said at para. 50:

> The respondent is of aboriginal heritage. However, once an offender is declared to be a long-term offender, consideration of restorative justice and other features of aboriginal offender sentencing will play little or no role. This is because the scheme relating to long-term offenders is designed to prevent warehousing offenders who, while dangerous, might be managed in the community. The offender, to achieve this status, will have demonstrated that he is unwilling to react to other less invasive forms of punishment.

73 This reasoning was adopted in *R. v. Ipeelee*, 2009 ONCA 892, 99 O.R. (3d) 419, leave to appeal to S.C.C. granted, [2010] S.C.C.A. No. 129, without reference to *L.M.*

74 In my respectful view, the direction to exercise restraint with particular attention to Aboriginal offenders is still to be applied even in the circumstances of a long-term offender. Much will depend on the circumstances, but the direction is not to be disregarded or downplayed simply because the accused is a long-term offender. Indeed, given the focus on rehabilitation and the reintegration of the offender in the community, as noted in *L.M.*, as well as protection of the public, the principles of restraint and restorative justice may play a significant role in sentencing such offenders, depending on the circumstances.

75 I add that this principle is not limited to Aboriginal offenders in this sense - *L.M.* clarifies the distinction between long-term and dangerous offenders, in that the former will return and live in the community after serving a fixed sentence. The principles of rehabilitation are still very much in play for a long-term offender. Here, the trial judge concluded that rehabilitation was no longer a factor for Mr. Ladue, which is an error, apart from her consideration of his Aboriginal circumstances.

76 There is no doubt that Mr. Ladue needs continual support in order to be free from intoxicants. He has been using them since he was nine years old. He has been sober in the past, and for a considerable period of time, so he has some ability to control his addiction. The corrections reports suggest that the best place for him to receive the level of support he needs is Linkage House in Kamloops, B.C. Because of a bureaucratic error, he was not sent there following his last release. Instead, he was sent to Belkin House, which placed him back into a milieu where he was sorely tempted by drugs.

77 After Mr. Ladue was charged with this offence, the corrections staff asked that he be re-screened for Linkage House. The author of the report stated: "[Mr. Ladue] desperately needs to

get away from downtown Vancouver. He requires the onsite resources of an Elder and ceremony. He needs to get immediately in touch with a residential school trauma counsellor. He has just been re-suspended for continued drug use." Linkage House was prepared to accept him after his suspension. The public will be best protected from Mr. Ladue if he can come to grips with his substance abuse while living in the community.

78 The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (s. 718.1). This principle has been held to be the most important principle in sentencing: *R. v. Arcand*, 2010 ABCA 363 at para. 65.

79 In *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, the Court said the following about the importance and meaning of the proportionality principle:

> [40] The objectives of sentencing are given sharper focus in s. 718.1, which mandates that a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". Thus, whatever weight a judge may wish to accord to the objectives listed above, the resulting sentence *must* respect the fundamental principle of proportionality. Section 718.2 provides a non-exhaustive list of secondary sentencing principles, including the consideration of aggravating and mitigating circumstances, the principles of parity and totality, and the instruction to consider "all available sanctions other than imprisonment that are reasonable in the circumstances", with particular attention paid to the circumstances of aboriginal offenders.
>
> [41] It is clear from these provisions that the principle of proportionality is central to the sentencing process (*R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12). This emphasis was not borne of the 1996 amendments to the *Code* but, rather, reflects its long history as a guiding principle in sentencing (e.g. *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.)). It has a constitutional dimension, in that s. 12 of the *Charter* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. But what does proportionality mean in the context of sentencing?
>
> [42] For one, it requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused (*R. v.*

> *M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 533-34, *per* Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J. V. Roberts and D. P. Cole, "Introduction to Sentencing and Parole", in Roberts and Cole, eds., *Making Sense of Sentencing* (1999), 3, at p. 10). Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

80 In my respectful view, the sentence of three years imposed by the trial judge was not proportionate to the gravity of the offence and the degree of responsibility of Mr. Ladue, when one considers his background and how he arrived at Belkin House instead of Linkage House.

81 I acknowledge that Mr. Ladue's repeated failure to abstain from substances while on release required some time back in prison. However, in my respectful opinion, a sentence of one year would properly reflect the principles and purpose of sentencing. I say this because it is enough time for Mr. Ladue to achieve sobriety, and enough time for the correctional staff to find an appropriate placement for him, preferably Linkage House or another halfway house which emphasizes Aboriginal culture and healing. In addition, a one-year sentence is more reflective of and more proportionate to the nature of his offence and his circumstances. Increasing his sentence substantially from his last sentence, which was based on time served on remand, does not meet the goals of the statutory sentencing regime.

82 In my respectful opinion, even when sentencing a long-term offender for a breach of a supervision order, particular attention must be given to the circumstances which brought the offender before the court. There are no doubt cases where the principles of restorative justice and rehabilitation have no, or little, role in sentencing. However, in this case, the circumstances of Mr. Ladue's background played an instrumental part in his offending over his lifetime and his rehabilitation is critical to the protection of the public.

83 Therefore, I would grant leave to appeal, allow the appeal and reduce his sentence to one year.

E.A. BENNETT J.A.
R.E. LEVINE J.A.:-- I agree.

Reasons for Judgment

The following is the judgment of

E.C. CHIASSON J.A. (dissenting):--

Introduction

84 I have had the privilege of reading a draft of the reasons for judgment of Madam Justice Bennett. Respectfully, I do not agree with her conclusion the judge erred in her consideration of the Aboriginal circumstances of the appellant and do not agree that a fit sentence in this case is incarceration for one year.

85 In my view, the judge did err by failing to take into account that the appellant's breach of condition by consuming intoxicants did not lead him on the path of re-offending. I consider that a sentence of two years is a fit sentence in the circumstances of this case.

Discussion

86 It is clear that an appellate court must give considerable deference to the decision of a sentencing judge. The standard of review was summarized by the Supreme Court of Canada in *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163 at para. 14:

> 14. In its past decisions, this Court has established that appellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that ... the sentence [is] clearly unreasonable" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46, quoted in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 15). This Court also made the following comment in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:
>
> > ... absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

87 It is important to consider the overall approach of the sentencing judge.

88 In para. 26 of the reasons at sentence, the judge made it very clear that she was well aware of the principles and objectives of sentencing:

> [26] Apart from situations where a minimum sentence is prescribed by law, an offender should only be incarcerated when no other available sentence will suffice to address all of the principles or objectives of sentencing, and any sentence of incarceration should be the minimum that is required to address all of the principles or objectives of sentencing. The sentencing judge must consider the circumstances of the offence and the circumstances of the offender, and

> attempt to craft a sentence which addresses all of those principles or objectives of sentencing for the unique offence committed by the unique offender in the case under consideration. The objectives of sentence generally relevant, and relevant here, are rehabilitation, general and specific deterrence, denunciation and isolation of the offender. [Emphasis added.]

89 In para. 27 she concludes that, on the basis of the circumstances of the case before her, she must emphasize isolation of the offender because this was the only way to protect the community from him.

90 I see no error of principle in these statements, but it is necessary to look at the circumstances that were before the judge.

91 I agree with my colleague's conclusion that the judge was entitled to consider and rely on the reports that were given to her. She did so. In fact, she declined to sentence the appellant on the day submissions were made and took the time to read all of the material. A number of important facts flow from the reports. These include:

a) the appellant's background as an aboriginal and the difficulties he suffered;
b) his repeated inability to deal with his substance abuse;
c) his history of blaming others for his failures;
d) he is a high risk to reoffend sexually and a moderate to high risk to reoffend violently;
e) he is not manageable in the community.

Aboriginal circumstances

92 The application of *R. v. Gladue*, [1999] 1 S.C.R. 688, was examined by this Court in *R. v. Jack*, 2008 BCCA 437. There, the Crown contended unsuccessfully that a sentencing judge had over emphasized the offender's Aboriginal circumstances and the sentence was too lenient. In my view, it is necessary to avoid that result in this case.

93 In para. 32 of *Jack* I had this to say:

> In *Gladue*, the Supreme Court of Canada placed the requirements of s. 718.2 of the *Criminal Code* into the context of the overall fundamental purpose and the principles of sentencing. The so-called Gladue factors neither can be considered in isolation nor be taken as the primary guide for sentencing an aboriginal offender. The Supreme Court had this to say in paras. 75, 80 - 81 and 88:
>
> 75. The role of the judge who sentences an aboriginal offender is, as for every offender, to determine a fit sentence taking into account all the

circumstances of the offence, the offender, the victims, and the community. Nothing in Part XXIII of the *Criminal Code* alters this fundamental duty as a general matter. However, the effect of s. 718.2(*e*), viewed in the context of Part XXIII as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(*e*) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.

...

80. As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

81. The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the *Criminal Code* and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(*e*), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply

> with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.
>
> ...
>
> 88. But s. 718.2(*e*) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal. To the extent that the appellant's submission on affirmative action means that s. 718.2(*e*) requires an automatic reduction in sentence for an aboriginal offender, we reject that view. The provision is a direction to sentencing judges to consider certain unique circumstances pertaining to aboriginal offenders as a part of the task of weighing the multitude of factors which must be taken into account in striving to impose a fit sentence. It cannot be forgotten that s. 718.2(*e*) must be considered in the context of that section read as a whole and in the context of s. 718, s. 718.1, and the overall scheme of Part XXIII. It is one of the statutorily mandated considerations that a sentencing judge must take into account. It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon all the factors which must be taken into account in each individual case. The weight to be given to these various factors will vary in each case. At the same time, it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.
>
> [Emphasis in original.]

94 In my view, s. 718.2(e) of the *Criminal Code*, R.S., 1985, c. C-46 and the Court in *Gladue* make it clear that the Aboriginal background of an offender is an additional factor to be taken into account by sentencing judges, but there is no general rule that requires generally emphasizing rehabilitation when sentencing Aboriginal offenders. In every case, the sentencing judge "must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender" what is the fit sentence.

95 While it may be that judges sometimes fail to take into account the Aboriginal circumstances of offenders, or appear not to do so (for example: *R. v. Johnny*, 2011 BCCA 25, para. 17), in my view, that is not the situation in this case. As my colleague observes, even if a sentencing judge

were to fail specifically to refer to the Aboriginal background of an offender it is not necessarily reversible error: *Jack*, para. 12; *Johnny* citing *R. v. Sutherland*, 2009 BCCA 534.

96 The appellant's Aboriginal background was discussed by his counsel during submissions before the sentencing judge. He stated:

> I needn't repeat and there is no need to further emphasize what happened to him and many, many others in residential schools.

and

> ... when we go all the way back to the beginning, he is born into both a family and a community wherein alcoholism and alcohol abuse and physical, sexual, and violent abuse are apparently rampant and seem to still persist as community problems to this day.

97 The judge's statement in para. 18 of her reasons shows that she was very alive to that background:

> He is a survivor of the residential school system, having suffered physical and sexual abuse at the hands of those who were supposed to be caring for him. He began using alcohol to numb the pain at the age of nine.

98 In para. 22, the judge quoted from the pre-sentence report which refers specifically to the appellant's "history of victimization" and his "horrible and tragic" experience in residential school.

99 The judge referred to and quoted from a September 22, 2009, Appraisal report. It refers specifically to the relationship between the appellant's substance abuse problems and his Aboriginal background. The judge also quoted portions of the report that refer to the appellant's victimization in his residential school experience and his participation in "aboriginal based" rehabilitation programs. As to the latter, the report states:

> [The appellant] ... did the Drug and Alcohol Program at Tsow-Tun Le Lum and other programs within the institutional setting. Despite this programming [the appellant] continues to return to drug use despite varying degrees of intervention from warnings, reductions in curfews, program participation and temporary suspensions.

The appellant undertook the program at Tsow-Tun Le Lum in 2001, which was prior to the commission of the predicate offence that resulted in his long-term offender designation.

100 It is apparent that the Aboriginal circumstances of the appellant were well known to the sentencing judge and were weighed by her as a sentencing factor. It is equally clear that the weight to be given to the various relevant sentencing factors is for the sentencing judge and not for this

Court. In *R. v. Punko*, 2010 BCCA 365, K. Smith J.A. had this to say (in dissent):

> [51] The deferential standard of review also applies to the weight given by the sentencing judge to the relevant sentencing factors. Appellate courts cannot interfere simply because they would have weighed the relevant factors differently. As Mr. Justice Laskin said in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.) at para. 35, in a passage quoted with approval in *Nasogaluak* at para. 46,
>
> > To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.
>
> [Footnote omitted.]

101 The material that was before the judge stated the appellant was a significant risk to reoffend and that he was not manageable in the community. It stated repeatedly that he did not take advantage of opportunities for rehabilitation that were available to him and that he had not come to terms with the need to take responsibility for his situation, all of which was quoted by the sentencing judge. Consideration of treatment facilities that focused more on Aboriginal issues was included in the material presented to the judge, as was the fact that the appellant's participation in them had not been successful.

102 In my view, the sentencing judge made no error in principle with respect to the appellant's Aboriginal circumstances. She considered them as a factor as she was required to do so by s. 718.2(e) of the *Criminal Code*. In compliance with *Gladue*, she weighed the information that was given to her. There is no basis for this Court to interfere with the judge's determination that protection of the community was the dominant factor in this case; no basis to conclude that the she erred in her consideration of the Aboriginal circumstances of the appellant.

103 Reference was made in argument to the notion that the circumstances of an Aboriginal offender are less significant after a long-term offender designation. I do not think any case goes so far as asserting the circumstances of an Aboriginal offender should not be taken into account at all

when considering a fit sentence for breach of a long-term offender supervision provision, but if there is that suggestion I would reject it. The relevant *Criminal Code* provision does not permit a court to ignore the circumstances of an Aboriginal offender in that or in any other context.

Sentence fitness

104 The sentencing judge recognized that the appellant was not before her "because he committed another substantive offence", but the reports provided to the judge made it clear that the authors consider the appellant was "at a high risk to reoffend sexually and at a moderate to high risk to reoffend violently". Clearly, substance abuse is a trigger to his illegal conduct and places him at great risk to reoffend, but he did not take steps on the path to reoffend beyond succumbing to his addictions. An apparent failure to take this fact into account in the reports may have overstated the risk posed to the community by the appellant and underplayed the possible benefit to the community if steps can be taken to address his addiction problem.

105 The reports were a foundation for the judge's conclusion that she "must emphasize ... isolation of the offender" and that "only by isolating [the appellant] from the community can I protect the community from him".

106 I do not quarrel with that basic proposition, which was well supported by the information given to the sentencing judge, but three years is three times the sentence previously imposed on the appellant for breach of his supervision conditions. The cases that support such a sentence all seem to involve not only "triggering" conduct, but activity that placed the offender very much on the path to reoffend. That was not the case here.

107 In my view, a fit sentence for the appellant must reflect the seriousness of the risk in which he placed himself. The reports are replete with the message that the appellant has failed repeatedly to deal with his addictions when in the community and that he blames others and circumstances for his failings: that is, he does not take responsibility for his condition. Repeating the sentence he received previously for violating conditions does not reflect the seriousness of the risk in which he places himself and the community by his continued substance abuse.

108 A sentence of three times the previous sentence may place him beyond hope of redemption and may flow from a failure to consider that the asserted high risk of reoffending with respect to the substantive offences was not engaged by the breach of condition for which the appellant was sentenced. A sentence of two years would be a significant step-up that would carry the message that he must take steps to deal with his problem, while removing him from the community for a significant period of time.

Conclusion

109 I would grant leave to appeal, allow the appeal and reduce the sentence to two years.

E.C. CHIASSON J.A.

cp/e/qlrds/qljxr

1 Canada, House of Commons Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence,* Issue No. 62 (17 November 1994) at 62:15.

2 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communications Group, 1996) at 53.

3 Michael Jackson, "Locking Up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release" (1988-1989) 23 U.B.C. L. Rev. 215.

4 Michelle M. Mann, *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections* (Ottawa: Office of the Correctional Investigator, November 2009) at 6. These statistics are also borne out by Julian V. Roberts and Ronald Melchers: see "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003) 45 Canadian J. Criminology & Crim. Justice 211.

5 Avani Babooram, "The changing profile of adults in custody, 2006/2007" (2008) 28:10 Juristat.

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